IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 607 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

TALPADA KOLI JAGDISH JINABHAI

Versus

STATE OF GUJARAT

Appearance:

MR M.J. BUDDHBHATTI for Petitioner No. 1

MR DP JOSHI, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL

Date of decision: 02/11/2001

ORAL JUDGEMENT

By filing this appeal under Section 374(2) of the Code of Criminal Procedure, 1973, the appellant has challenged the legality of judgement dated July 10, 1990 rendered by the learned Additional Sessions Judge, Rajkot by which he is convicted of the offences punishable under Sections 376 and 452 of the Indian Penal Code and punished with rigorous imprisonment for five years and fine of Rs.500/- in default rigorous imprisonment for two months for the offence punishable under Section 376 of the Indian Penal Code as well as rigorous imprisonment for six months and fine of Rs.100/- in default rigorous imprisonment for 15 days for the offence punishable under

Section 452 of the Indian Penal Code.

2. The case of the prosecution is that on April 6, 1988, the appellant had committed trespass in the house of Jerambhai Popatbhai at about 3:30 a.m. and committed rape on his minor daughter Gita against her wish. The complaint in the case was filed by Rasilaben Madhubhai who is elder sister of the prosecutrix. The complaint was investigated by Mr.S.H.Zala who was then P.S.I. of Jasdan Police Station. On completion of investigation, the appellant was charge-sheeted of the offences punishable under Sections 376 and 452 of the Indian Penal Code in the Court of learned Judicial Magistrate (F.C.), Jasdan. As the offence punishable under Section 376 of the Indian Penal Code is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Rajkot for trial where it was numbered as Sessions Case No.70 of 1988. The charge at Exh.1 was framed by the learned Additional Sessions Judge against the appellant of the offences punishable under Sections 376 and 452 of the Indian Penal Code. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined prosecutrix and other witnesses to prove its case against the appellant. Documentary evidence was also produced by the prosecution in support of its case against the appellant. After recording of evidence of prosecution witnesses was over, further statement of the appellant was recorded under Section 313 of Code of Criminal Procedure. On appreciation of the evidence adduced by the prosecution, the learned Judge held that on the date of the incident the prosecutrix was under 16-years of age, and therefore, though the appellant had committed sexual intercourse with the prosecutrix with her consent, the appellant was liable to be convicted of the offence punishable under Section 376 of the Indian Penal Code. The learned Judge relied upon the evidence of prosecution witnesses and more particularly that on Rasilaben and Vijuben for the purpose of holding that the appellant had also committed house trespass. In view of the above referred to conclusions, the learned Judge held that the appellant had committed offences punishable under Sections 376 and 452 of the Indian Penal Code. Thereafter, the learned Judge heard the appellant on question of sentence and has imposed sentence which is referred to earlier by judgement dated July 10, 1990 which has given rise to the present appeal.

3. I have heard Mr.M.J.Buddhbhatti, learned Counsel for the appellant as well as Mr.D.P.Joshi, learned A.P.P.

for the State of Gujarat. Mr.Buddhbhatti, learned Counsel for the appellant after taking me through the entire evidence on record has stated at the Bar that he does not challenge the finding recorded by the learned Judge that the prosecutrix was under 16-years of age on the date of the incident and that the appellant had sexual intercourse with the prosecutrix with her consent. As the finding recorded by the learned Judge on merits is not challenged, it is not necessary for me to examine in detail the evidence produced by the prosecution to prove the case of rape on the prosecutrix by the appellant after committing house trespass. Even otherwise, the said case stands proved by the evidence of prosecutrix and other witnesses examined during the course of trial. The evidence of prosecutrix has a ring of truth and inspires confidence. Therefore, there is no reason to disbelieve her case that the appellant had sexual intercourse with her on the date of the incident. However, her evidence also establishes that she was a consenting party and that no force was used by the appellant while having sexual intercourse with her. Her evidence shows that after the sexual intercourse, the appellant and the prosecutrix were found sitting in the terrace of the house and that the prosecutrix as well as the appellant were beaten by Vijuben who is mother of the prosecutrix and Rasilaben who is elder sister of the prosecutrix. Having regard to the totality of the facts and circumstances of the case, there is no manner of doubt that the appellant had sexual intercourse with the prosecutrix with her consent. Therefore, the finding recorded by the learned Judge that the appellant has committed offences punishable under Sections 376 and 452 of Indian Penal Code being eminently just is hereby upheld.

4. This brings me to the question of sentence to be imposed on the appellant. Mr.Buddhbhatti, learned Counsel for the appellant has pointed out that with reference to the incident in question, the appellant was arrested on April 7, 1988 and that he was enlarged on bail on June 13, 1988. The learned Counsel has further pointed out that the judgement convicting the appellant was delivered by the learned Additional Sessions Judge, Rajkot on July, 10, 1990 and the appellant was taken into custody immediately but the Division Bench comprising R.A.Mehta and K.G.Shah, JJ vide order dated November 8, 1990 had enlarged the appellant on bail while admitting the appeal. According to the learned Counsel for the appellant, the appellant belongs to backward community of Talpada Koli and was aged only about nineteen-years when the incident had taken place and, therefore, lenient view

should be taken by the Court in the matter of imposition of sentence on him. What is pointed out by the learned Counsel for the appellant is that the appellant is doing casual labour work and as the prosecutrix was a consenting party to sexual intercourse, the punishment of imprisonment already undergone by him should be imposed while upholding the conviction of the appellant of the offences punishable under Sections 356 and 452 of the Indian Penal Code. The learned A.P.P. has submitted that cogent and convincing reasons have been given by the learned Additional Sessions Judge, Rajkot for imposing punishment of five years and fine of Rs.500/- in default rigorous imprisonment for two months imposed while convicting the appellant of the offence punishable under Section 376 of the Indian Penal Code, and therefore, the punishment should not be reduced as urged by the learned Counsel for the appellant.

5. I have considered the rival submissions advanced at the Bar regarding imposition of punishment on the appellant. The fact that the prosecutrix was a consenting party is not in dispute. It hardly needs to be emphasised that on the date of the incident, the appellant was an adolescent. The evidence of prosecutrix would show that the appellant and the prosecutrix were of immature age. Though sexual intercourse with the prosecutrix with her consent would amount to rape, the factors such as that she had willingly participated in sexual intercourse with the appellant and that she was meeting the appellant in past often cannot be ignored while imposing the sentence on the appellant. The appellant at the relevant time was of immature of age and must have been led away as well as fallen to temptation but he cannot be treated like a sex maniac. Further the appellant belongs to backward community and is not well settled in life. Moreover, the appellant was enlarged on bail by the Division Bench vide order dated November 8, 1990 whereas the appeal is being heard after eleven-years. The evidence of prosecutrix would show that she is married and leads a happy life. In fact, her evidence would indicate that she had developed intimacy with the appellant when she was doing labour work in a relief project. Having regard to the totality of the facts of the case, I am of the view that interest of justice would be served if the appellant is punished with imprisonment which he has already undergone while upholding his conviction of the offences punishable under Sections 376 and 452 of the Indian Penal Code.

5. For the forgoing reasons, the appeal partly succeeds. The conviction of the appellant of the

offences punishable under Sections 376 and 452 of the Indian Penal Code is maintained. However, the punishment of rigorous imprisonment for five years and fine of Rs.500/- in default rigorous imprisonment for two months imposed for the offence punishable under Section 376 of the Indian Penal Code as well as punishment of rigorous imprisonment of six months and fine of Rs.100/- in default rigorous imprisonment for 15 days imposed for the offence punishable under Section 452 imposed by the learned Additional Sessions Judge, Rajkot is hereby set aside. Instead the appellant is punished with imprisonment which he has already undergone for the offences punishable under Sections 376 and 452 of the Indian Penal Code. As the appellant has undergone the altered sentence imposed by this Court for the offences punishable under Sections 376 and 452 of the Indian Penal Code, he need not be taken into custody again. The appeal is accordingly allowed. Bail bond stands cancelled.

6. Muddamal to be disposed of in terms of the directions given by the learned judge, Rajkot in the impugned judgement.

(J.M.Panchal, J)

'Bhavesh'